No. 77-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC.
MIDDLE ATLANTIC CONFERENCE
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
NEW ENGLAND MOTOR RATE BUREAU, INC.
NIAGARA FRONTIER TARIFF BUREAU, INC.
ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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August 11, 1978

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INTRODUCTION

This reply brief is filed in response to the joint brief of Respondents United States of America and Interstate Commerce Commission (Federal Respondents). Herein, Petitioners will rebut the primary contentions upon which Respondents ground their opposition to the above-referenced petition for a writ of certiorari (Petition).

REPLY ARGUMENT

This case raises the question of whether the Interstate Commerce Commission (ICC) can accomplish indirectly by regulatory fiat what all parties agree it cannot accomplish directly; to wit, whether the Commission exceeded its authority when it ordered motor common carriers of property to establish new through routes and joint rates with one another. The predicate of the argument made by Federal Respondents is that the through route service which Petitioners claim the ICC has established pre-existed the ICC's order. On this predicate, the Federal Respondents distinguish *Thompson* v. *United States,* 343 U.S. 549 (1952), urging that, "In *Thompson* the issue was whether a through route of any kind existed," while here "the carriers did voluntarily enter into through carriage *service* and held themselves out as providing such service (even though joint *rates* were offered only on a limited, two-carrier basis)." (Resp. Br., p. 7). Respondents further urge that "*Thompson* involved only a through service problem; the present case concerns the rates to be charged for established through services." (Resp. Br., p. 8).

But the issue here is precisely the extent to which through routes existed prior to the Commission's order. And the resolution of the issue is inseparable from the question of the rates to be charged for through services. Prior to the Commission's order, the petitioning carriers held out through service—i.e., through routes—but only on a limited basis. The indicia of the limit on their through service was their tariff limiting application of joint rates to two carrier hauls. That tariff manifested a decision among petitioning carriers *not* to offer joint rates or through

routes on hauls involving more than two carriers. Hence, the situation which pre-existed the Commission's order here was precisely that which existed in *Thompson* prior to the Commission's order—physically connecting carriers offering to the shipping public, not through service, but a combination of separate and distinct single-line services.

Thompson is thus right on point. The Court there held that a through route is manifested by the presence of a joint "holding out", i.e., an agreement between physically connecting carriers for the continuous carriage of goods between points on the line of one and points on the line of the other. This Court also held that mere physical interconnection of single-line services would not establish a through route. *Thompson* held that:

> The logical conclusion . . . [of such reasoning would be] that through routes exist between all points throughout the country wherever physical rail connections are available. 343 U.S. at 559.

There was *no agreement* between the physically connecting railroads in *Thompson* and hence this Court found that there was no through route. Here, there was likewise *no agreement* among carriers sharing common interchange points to offer anything other than limited, two carrier through routes. The Commission's order effectively forces carriers to make a new agreement; forces carriers to offer joint rates on three carrier hauls and thereby to "hold out" new three carrier through service. The order therefore exceeds the Commission's statutory authority.

The predicate for the argument of Federal Respondents thus shattered, their remaining contentions are easily disposed of.

Federal Respondents urge that Sections 208(a), 204(a)(1) and 204(a)(6) of the Act,[1] authorize the Commission to order the expansion of existing motor common carrier through routes and to thereby establish new through routes. However, these generalized grants of authority cannot nullify the specific provisions of Section 216(c) which provides only that motor common carriers of property "*may* establish reasonable through routes and joint rates . . . with other such carriers. . . ." See *Smith Bros. Revocation of Certificate,* 53 M.C.C. 465 (1942); *Removal of Truckload Lot Restrictions,* 106 M.C.C. 455 (1958). Section 208(a) merely grants the Commission authority to attach terms and conditions to certificates of public convenience and necessity and such certificates do not and cannot require carriers to provide through route service. And as shown in the petition, the generalized grant of regulatory authority contained in Section 204 is restricted by the limits of the regulatory system—i.e., by the limitation in Section 216 against Commission mandated through routes.

Respondents' reliance on *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 387 U.S. 397 (1967), as justification for the Commission's action is misplaced. In that case, the authority of the Commission over through routes was not at issue. The railroads published tariffs holding themselves out to the public to render piggy-back service, i.e., to transport highway trailers on flatcars. However, the service was not available to motor carriers. The Commission held that the railroads' restriction against such use unlawfully discriminatory against motor carriers.

[1] 49 U.S.C. §§ 308(a), 304(a)(1) and 304(a)(6).

The railroads argued to this Court that the effect of the Commission's decision was to compel them to enter into through routes with motor common carriers in contravention of Section 216(c) of the Act. This Court answered that the Commission had not required the railroads to enter into through routes, but only to accept freight tendered to them by motor common carriers under the same terms and conditions as they accept freight tendered by anyone else. What the Commission did here was to require that carriers establish through routes and joint rates which, in the words of this Court, "is quite different."

Finally, the Federal Respondents urge that the ICC did not err because its action was reasonable and warranted by the evidence. The simple answer to this contention is that it is irrelevant. If the ICC lacked jurisdiction to issue its order, and that is the sole issue raised by the petition, then the order cannot stand.

Respectfully,

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